

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FREDDIE A. PARSONS,)
Petitioner,)
)
v.)
)
LUIS SPENCER,)
Respondent.)
)

CIVIL ACTION
NO. 05-11315-REK

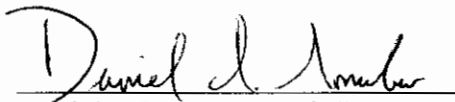
**RESPONDENT'S SUPPLEMENTAL APPENDIX TO MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS MIXED HABEAS CORPUS PETITION**

The respondent, Luis Spencer, hereby files the following documents as his supplemental appendix in support of his motion to dismiss mixed habeas corpus petition:

1. Docket Sheets, *Commonwealth v. Parsons*, Bristol Superior Court No. 2000-0195; and
2. Application for further appellate review, *Commonwealth v. Parsons*, FAR No. 14189, that the petitioner filed in the Supreme Judicial Court.

Respectfully submitted,

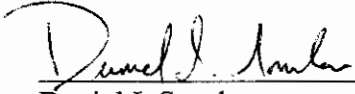
THOMAS F. REILLY
ATTORNEY GENERAL


Daniel I. Smulow, BBO # 641668
Assistant Attorney General
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One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2949

Dated: July 22, 2005

Certificate of Service

I hereby certify that a true copy of the above document was served on Freddie A. Parsons, W-70538, M.C.I. - Norfolk, P.O. Box 43, Two Clark Street, Norfolk, MA 02056-0043, by first class mail, postage prepaid, on July 22, 2005.



Daniel I. Smulow

**Commonwealth of Massachusetts
 SUPERIOR COURT
 Case Summary
 Criminal Docket**

Commonwealth v Parsons, Freddie

Details for Docket: BRCR2000-00195

Case Information

Docket Number:	BRCR2000-00195	Caption:	Commonwealth v Parson Freddie
Entry Date:	06/15/2000	Case Status:	Crim 2 Ctrm 2 -lower (Ne Bedford)
Status Date:	02/08/2002	Session:	Disposed (sentenced)
Lead Case:	NA	Deadline Status:	
Trial Deadline:		Jury Trial:	NO

Parties Involved

4 Parties Involved in Docket: BRCR2000-00195

Party Involved:		Role:	Defendant
Last Name:	Parsons	First Name:	Freddie
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			
Party Involved:		Role:	Other interested party
Last Name:	File Copy	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			
Party Involved:		Role:	Plaintiff
Last Name:	Commonwealth	First Name:	

Address:
City:
Zip Code:
Telephone:

Address:
State:
Zip Ext:

**Party
Involved:**

Last Name: Pitta
Address: 27 Viall Street
City: New Bedford
Zip Code: 02740
Telephone:

Role: Surety
First Name: Carol A
Address:
State: MA
Zip Ext:

Attorneys Involved

4 Attorneys Involved for Docket: BRCR2000-00195

**Attorney
Involved:**

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Fascimile: 617-988-8484

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State: MA
Zip Ext:
Tel Ext:
Representing: Parsons, Freddie (Defendant)

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Involved:**

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Fascimile:

Firm Name:
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Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Parsons, Freddie (Defendant)

**Attorney
Involved:**

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Firm Name: KECH01
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City: Taunton
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Telephone: 508-822-2000
Fascimile: 508-822-8022

State: MA
Zip Ext:
Tel Ext:
Representing:

Attorney Involved:
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City: Boston
Zip Code: 02108
Telephone: 617-482-6212
Fascimile: 617-988-8495

Firm Name: MA130
First Name: Benjamin H
Address: Suite 310-A
State: MA
Zip Ext:
Tel Ext:
Representing: Parsons, Freddie (Defendant)

Calendar Events

18 Calendar Events for Docket: BRCR2000-00195

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	11/24/2000	08:30	Hearing: Motion	1	Event not held--scheduled for anot date
2	12/21/2000	08:30	Hearing: Motion	1	Event not held--scheduled for anot date
3	01/12/2001	08:30	Hearing: Motion	1	Event not held--scheduled for anot date
4	01/29/2001	08:30	Hearing: Motion	1	Event held as scheduled
5	02/20/2001	08:30	Conference: Pre-Trial	1	Event not held--scheduled for anot date
6	03/02/2001	08:30	Conference: Pre-Trial	1	Event held as scheduled
7	03/29/2001	08:30	Conference: Lobby	1	Event held as scheduled
8	04/19/2001	08:30	Conference: Status Review	1	Event held as scheduled
9	05/04/2001	08:30	Conference: Status Review	1	Event not held--scheduled for anot date
10	06/05/2001	08:30	TRIAL: by jury	1	Event not held--scheduled for anot date
11	07/30/2001	08:30	TRIAL: by jury	1	Event not held--scheduled for anot date
12	08/08/2001	08:30	Hearing: Motion	1	Event not held--scheduled for anot date
13	08/10/2001	08:30	Hearing: Motion	1	Event held as scheduled
14	10/18/2001	08:30	TRIAL: by jury	1	Event not held--scheduled for anot

					date
15	11/26/2001	08:30	TRIAL: by jury	1	Event not held--joint request
16	01/07/2002	08:30	TRIAL: by jury	2	Trial begins
17	01/08/2002	08:30	TRIAL: by jury	2	Trial ends
18	02/08/2002	09:00	Hearing: Sentence Imposition	2	Event held as scheduled

Full Docket Entries

95 Docket Entries for Docket: BRCR2000-00195

Entry Date:	Paper No:	Docket Entry:
06/15/2000		Original case info: ORIGIN=I.
07/11/2000		RE Offense 1:Plea of not guilty
07/11/2000		RE Offense 2:Plea of not guilty
07/11/2000		RE Offense 3:Plea of not guilty
11/10/2000		Stat at cnvrsn to cmputr 11/10/2000.
11/10/2000		(see docket book for previous docket entries).
03/29/2001		Deft.'s Motion (#7) for Discovery - By agreement of the parties and
03/29/2001		with the adopted modifications set forth herein, this Motion is
03/29/2001		ALLOWED. (McLaughlin, J.)
07/30/2001	9	Motion To Continue filed.
08/10/2001		Motion #9: Defendant's motion to continue trial, by agreement of the
08/10/2001		parties, this motion is ALLOWED, with a new trial date set for
08/10/2001		October 18, 2001 (Burnes, J.) PFL
01/07/2002	10	Motion by Deft: Motion for Examination of Jurors in Addition to
01/07/2002	10	Statutory Questions and Questions Pursuant to Commonwealth vs.
01/07/2002	10	Flebotte
01/07/2002		Motion (P#10) Allowed in part; Denied in part. (John A. Tierney) MAF
01/07/2002	11	Motion by Deft: Motion to Conduct a Voir Dire of All "Fresh
01/07/2002	11	Complaint" Witnesses
01/07/2002		Motion #11: Withdrawn by Counsel
01/07/2002	12	Motion by Deft: Motion in Limine
01/07/2002		Motion #12: Ruling on the Record. (Tierney, J.) MAF
01/07/2002	13	Commonwealth's list of potential witnesses
01/07/2002	14	Defendant's list of witnesses
01/08/2002	15	Motion by Deft: for a required finding of not guilty
01/08/2002		Motion (P#15) denied (John A. Tierney, Justice).
01/08/2002	16	Defendant's request for Jury Instructions
01/08/2002	17	List of exhibits

01/08/2002	18	Verdict of guilty - Rape of Child -Use of Force, as to Offense A
01/08/2002	19	Verdict of guilty, as to Offense B
01/08/2002	20	Verdict of guilty, as to Offense C
01/08/2002		RE Offense 1:Guilty verdict
01/08/2002		RE Offense 2:Guilty verdict
01/08/2002		RE Offense 3:Guilty verdict
01/08/2002		Bail set on July 11, 2000 revoked; Defendant ordered HELD WITHOUT BAIL
01/08/2002	21	Bail: mittimus issued
01/11/2002		Bail in the amount of \$5,000.00 returned to Surety Carol A. Pitta
01/11/2002		Check #4146
02/08/2002	22	Commonwealth files memorandum in support of sentencing recommendation
02/08/2002		Defendant sentenced to Massachusetts State Prison for the term of not
02/08/2002		more than seven (7) years and one (1) day nor less than seven (7)
02/08/2002		years, as to Offense 1; Defendant advised of his right to appeal to
02/08/2002		the Appellate Division of the Superior Court for a review of said
02/08/2002		sentence; Defendant advised of his right to appeal the judgment and
02/08/2002		sentence of the Court within thirty (30) days thereof under MRCP Rule
02/08/2002		4b; T.C. -33- days (John A. Tierney, Justice)
02/08/2002	23	Mittimus for safe keeping issued to Cedar Junction MCI (Walpole)
02/08/2002		Defendant sentenced to Probation for the term of twenty (20) years,
02/08/2002		as to Offense 2; to commence from and after release from
02/08/2002		incarceration this day imposed on Offense 1; Defendant ordered to
02/08/2002		have special terms and conditions of Probation (John A. Tierney,
02/08/2002		Justice)
02/08/2002		Offense 3, placed on file per order of the Court. (John A. Tierney,
02/08/2002		Justice)
02/08/2002		Victim-witness fee assessed: \$60.00
02/08/2002		Assessment of \$50.00 per month re: Probation Supervision Fee
02/08/2002		Defendant warned per Chapter 22E Sec. 3 of DNA
02/08/2002		Notice of duty to register as a sex offender.
02/15/2002	24	Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed
02/15/2002	24	by Freddie Parsons
02/19/2002	25	Letter transmitted to the Appellate Division. All parties notified
02/19/2002	25	February 19, 2002
02/19/2002	26	Motion to Withdraw and for appointment of counsel
02/19/2002	27	NOTICE of APPEAL FILED by Freddie Parsons
02/20/2002		Motion (#26) ALLOWED (Tierney, J.)
02/26/2002	28	Motion by Deft: to Waive Victim/Witness Assessment Fee
02/28/2002	29	Court Reporter Silvia, Marilyn is hereby notified to prepare one copy
02/28/2002	29	of the trial transcripts of the evidence of January 07 and 08 2002.
02/28/2002	30	Court Reporter Saulnier, Lori E. is hereby notified to prepare one

02/28/2002	30	copy of the transcript of the sentencing of February 08, 2002.
03/06/2002		Motion (P#28) denied (Charles Hely, Justice). Copies mailed.
03/07/2002	31	Defendant files motion to revise and revoke sentence (no hearing
03/07/2002	31	requested at this time)
03/12/2002	32	Transcript of sentencing testimony received of February 8, 2002,
03/12/2002	32	volumes #1, from court reporter, Saulnier, Lori E.
03/22/2002	33	Appearance of Deft's Atty: Benjamin H Keehn
04/16/2002		Victim-witness fee paid as assessed
10/17/2002	34	Transcript of trial testimony from January 7, 2002 received volumes #
10/17/2002	34	1 from court reporter, Silvia, Marilyn
10/17/2002	35	Transcript of trial testimony from January 8, 2002 received volumes #
10/17/2002	35	2 from court reporter, Silvia, Marilyn
12/02/2002	36	Certificate of delivery of transcript by clerk filed.
12/20/2002	37	Statement of the case on Appeal
12/20/2002	38	Notice of assembly of record; mailed to Appeals Court per Rule 9(d)
12/20/2002		Notice of completion of assembly of record sent to clerk of Appeals
12/20/2002		Court and attorneys for the Commonwealth and defendant.
12/24/2002	39	Appearance of Deft's Atty: Eric S Brandt
01/07/2003	40	Notice of Entry of appeal received from the Appeals Court on December
01/07/2003	40	23, 2002 No. 2002-P-1688
08/22/2003	41	Notice of Docket Entry received from the Appellate Division of the
08/22/2003	41	Superior Court: May 21, 2003 defendant withdrew petition for review
08/22/2003	41	of sentence (Robert DelloRusso, Assistant Clerk/Magistrate)
07/26/2004	42	Rescript received from Appeals Court; judgment AFFIRMED
09/24/2004	43	Defendant files motion to revise and revoke sentence (does not
09/24/2004	43	request a hearing at this time)

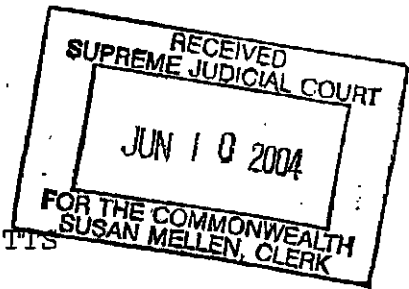
Charges

3 Charges for Docket: BRCR2000-00195

No.	Charge Description:	Indictment:	Status:
1	Rape by force, child under 16		Guilty verdict
2	Assault, intent to rape child under 16		Guilty verdict
3	Indecent assault & battery on child under 14		Guilty verdict

FAR 14189

CLERK'S COPY



COMMONWEALTH OF MASSACHUSETTS

BRISTOL COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 02-P-1688

COMMONWEALTH

V.

FREDDIE PARSONS

DEFENDANT'S APPLICATION FOR
FURTHER APPELLATE REVIEW

Now comes the defendant, pursuant to Mass. R.A.P. 27.1, and requests that he be granted leave to obtain further appellate review of his convictions on Bristol County indictments no. 2000-195(1-3).

The grounds for this application are stated in the accompanying memorandum.

Respectfully submitted,

FREDDIE PARSONS

By his attorney,

A handwritten signature in cursive script, appearing to read "Eric Brandt".

Eric Brandt
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108
(617) 482-6212
BBO #054130

Dated: June 10, 2004.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 02-P-1688

COMMONWEALTH

V.

FREDDIE PARSONS

MEMORANDUM IN SUPPORT OF DEFENDANT'S
APPLICATION FOR FURTHER APPELLATE REVIEW

STATEMENT OF PRIOR PROCEEDINGS

On June 15, 2000, the defendant, Freddie Parsons, was charged in three indictments with the following offenses: forcible rape of a child, G.L. c.265, §22A; indecent assault and battery on a child, G.L. c.265, §13B; and assault with intent to rape a child, G.L. c.265, §24B (R. 6-8).^{1/} The defendant pleaded not guilty (R. 1).

On January 7 and 8, 2002, the indictments were tried to a jury in the Bristol Division of the Superior Court Department (Tierney, J., presiding). The jury returned verdicts of guilty (R. 3-4).

^{1/}The record appendix is cited as "(R.)." The transcript of the trial is cited by volume and page as "(Tr. /)." The Appeals Court's memorandum of decision is cited as "(Memo.)."

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On February 8, 2002, the defendant was sentenced on the rape charge to a term of seven years to seven years and a day at Massachusetts Correctional Institution, Cedar Junction (R. 4). On the indecent assault and battery charge, he was sentenced to twenty years probation (R. 4). The charge of assault with intent to rape was placed on file (R. 4). The defendant's notice of appeal was filed on February 19, 2002 (R. 11).

The case was subsequently briefed in the Appeals Court and oral argument was heard on January 8, 2004. On May 28, 2004, the Court affirmed the convictions in an unpublished memorandum issued pursuant to Rule 1:28.

The defendant has not filed a petition for rehearing in the Appeals Court.

STATEMENT OF FACTS

This case arises out of allegations that the defendant sexually abused the complainant over a period of two years. The sole issue at trial was whether the alleged abuse actually occurred or whether it was fabricated by the complainant.

A. The Commonwealth's Case

The Commonwealth's case consisted of testimony from the complainant and two other witnesses who gave

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evidence of fresh complaint. The principal testimony before the jury is summarized below.

At the time of trial, the complainant was fourteen years old and in the ninth grade (Tr. I/118, 122). At the time in question, she was ten to twelve years old and in the fifth to seventh grades (Tr. I/122, 134, 143). During that time, she lived in an apartment in New Bedford with her mother, her three siblings, and the defendant, who was her mother's boyfriend (Tr. I/118-120; II/4).

1. The Alleged Incidents

According to the complainant, the first incident of abuse occurred when she was in the fifth grade, on a day when the defendant drove her to dance class (Tr. I/123, 143-144). At several points in her testimony, the complainant claimed that on that day, the defendant touched her breast and touched her vagina under her tights (Tr. I/124-125, 145-146). At other points in her testimony, however, she acknowledged that she had no memory of any touching by the defendant on that day:

Q. [By the Prosecutor] Can you tell us what happened on that day that you went to dance class with the tights?

A. No.

(Tr. I/124)

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Q. Do you remember being touched where you shouldn't be touched on that day going to dance class?

A. No.

(Tr. I/125)

Q. Did you tell me, when I first asked, that you didn't have a memory of what happened to you on the day you were wearing tights?

A. Yes.

Q. Do you now have a memory of that?

A. No.

(Tr. I/188)

Q. Do you know, right now, as I'm speaking to you, exactly what happened with the tights?

A. No.

(Tr. I/189)

Q. [By Defense Counsel] So, you have no memory of what happened in the car on the day with the tights?

A. No.

(Tr. I/193)

According to the complainant, another incident occurred in the sixth or seventh grade (Tr. I/126, 170-171), when the defendant drove her to an airport and parked the car (Tr. I/126-127). At one point in her testimony, she claimed that while in the car, the defendant put his fingers in her vagina, tried to put his penis near her mouth, which she "refused" (Tr.

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I/128-129), and ejaculated on her (Tr. I/127, 172). The complainant also claimed that this occurred at the airport on two occasions that she could remember (Tr. I/129-130, 171). At other points in her testimony, however, she acknowledged that she did not recall the defendant doing anything "with his hands" on "any" occasion at the airport (Tr. I/130, 172-173).

According to the complainant, there were other incidents that occurred at home in the apartment, where the defendant would come to her room at night and wake her up (Tr. I/131). During those incidents, she claimed, the defendant also put his fingers in her vagina, or put his penis near her mouth, which she "refused," and ejaculated on her stomach or back (Tr. I/131-132).

When asked how often "something like this" occurred during the period when she was ten to twelve years old, the complainant first answered that she could not say, and then claimed that it occurred every week or every other week (Tr. I/134-135, 182). When asked when the last time was that "something like this" occurred, she first answered that she did not recall, and then claimed that it occurred in January of seventh grade (Tr. I/132, 134).

As to her difficulty in recalling what she called "the details" (Tr. I/125, 130), the complainant agreed

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that she did not remember everything (Tr. I/165, 186-187) and, on cross-examination, acknowledged that she did not remember "a lot of things" (Tr. I/178).

2. The Fresh Complaint Evidence

The Commonwealth presented evidence of fresh complaint from Stephanie Conigo, a friend and classmate of the complainant's (Tr. I/133; II/46). According to the complainant and Conigo, they had two conversations about the matter (Tr. I/136; II/48), which occurred two or three weeks apart (Tr. I/161, 164-165; II/49, 56). Conigo testified that in the first conversation, the complainant said that the defendant was "touching" her and wanted her to "do things that she didn't want to do" (Tr. II/48). Conigo testified that they were "really good friends" (Tr. II/46-47), and that she believed the complainant for that reason (Tr. II/58).

The second conversation occurred at Conigo's house on February 19, 2000 (Tr. I/137, 155; II/44-45), late in the afternoon, when the complainant became very upset because she did not want to go home (Tr. I/138-139; II/51). Following that conversation, Conigo telephoned the complainant's mother at work and spoke to her briefly (Tr. I/138-139; II/17, 39, 50-52, 58-59). The complainant testified that she then got on the phone and told her mother that the defendant had

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been "touching" her (Tr. I/139). The Commonwealth's remaining witness, the complainant's mother, also testified that the complainant made this complaint to her at that time (Tr. II/23, 44).

3. The Defendant's Statements

The complainant's mother, Kimberly Rock, testified that following the complainant's phone call, she went home to the apartment and spoke to the defendant (Tr. II/25-26). On direct examination, Rock testified that the conversation went as follows. When she told the defendant of the complainant's claim that he had been touching her, the defendant asked, "What do you mean?" (Tr. II/25-26). When she asked him directly if he had touched her daughter's "twat", he replied, "What are you talking about? I didn't do that" (Tr. II/26). When she persisted in asking if he had touched her daughter, he said, according to her, "Maybe I hugged her, and kissed her, and maybe I touched her a little bit below, but just because I love her" (Tr. II/26). Rock then told the defendant to leave, following which he said, "I'm sorry. I just love her. I didn't do anything wrong" (Tr. II/26-27).

On cross-examination, however, Rock initially denied that the defendant's first response was to ask, "What do you mean?" (Tr. II/33). She then

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admitted telling the police that this was, in fact, his first response, and that he next asked, "What, hugging her?" (Tr. II/33-34). Also on cross-examination, Rock twice asserted that the defendant did not deny committing the touching claimed: "He never said no" (Tr. II/34), "He never denied it" (Tr. II/41). She ultimately admitted, however, that "[m]aybe" she told a nurse at the hospital that the defendant did deny the claim (Tr. II/41), as the nurse later testified (Tr. II/71).^{2/}

B. The Defendant's Evidence

The defense presented additional evidence on cross-examination of Commonwealth witnesses and through a witness called by defense counsel. That evidence included the following.

1. The Complainant's Motive to Lie

The complainant testified that her natural father, whom she loved, left the house when she was eight years

^{2/}Based on this testimony, defense counsel, in closing argument, also challenged the credibility of Rock's testimony that the defendant admitted the touching claimed: "[H]e denied it. She didn't want to give you that. She wanted to shade it in a way that you would think that maybe he did it.... I shouldn't have to stand up there and pull it out of her. He denied it the second she confronted him. And she didn't want to admit that. Ultimately she did, but that's important" (Tr. II/93).

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old, and that she subsequently missed her father (Tr. I/147-148). She acknowledged that when the defendant moved into the house, "I really didn't like him" because "[h]e tried to act like my father" (Tr. I/120-121, 146, 152). She also acknowledged that throughout their subsequent relationship, "I really never liked him" (Tr. I/121). She agreed that she "resented" the defendant's attempts to set rules for her and enforce discipline in the house (Tr. I/147, 148), as her mother also testified ("She would get resentful. She would say that he's not her father") (Tr. II/8-9, 35). The complainant explained: "He was telling me like what I can do and what I couldn't do, and I didn't like that. Until this day, I still don't like it if any man came into my house and told me what to do" (Tr. I/147).

The complainant testified that she complained to her mother about the defendant's rules, but that her mother tended to defer to the defendant, which she also resented (Tr. I/149-150). Her mother confirmed that she complained about the defendant's rules "[l]ots of times, almost every time" he enforced them (Tr. II/9), and agreed that she sometimes did so "right in front of him" (Tr. II/36). Rock testified that the complainant had "no

-10-

problem speaking her mind" to her mother (Tr. II/35).^{2/}

One of the defendant's rules was that he ordinarily did not allow the children to do sleepovers (Tr. I/149-150). On February 19, 2000, the complainant wanted to do a sleepover with Conigo, as the complainant and her mother both acknowledged (Tr. I/137-138, 158-159; II/38). Although her mother would have permitted the sleepover (Tr. II/38), the defendant refused to allow it (Tr. I/138; II/38) and was emphatic in his refusal (Tr. I/176). The complainant's mother agreed that the complainant was "openly upset" by the defendant's refusal (Tr. II/38), and the complainant herself acknowledged that she was "mad" about the refusal (Tr. I/176). It was later that day that the complainant first complained to her mother that the defendant had

^{2/}Based on this testimony, defense counsel, in closing argument, challenged the credibility of the complainant's claim that she was "scared" to tell her mother about the alleged abuse (Tr. I/132, 137): "[She] was not a shrinking violet. This is not a girl who couldn't [speak] when something bothered her.... And that's important when you think [about her claim] that she couldn't say anything because she was afraid" (Tr. II/88). "[She was] openly critical [of the defendant], even at some points, with him right there.... Does anybody really believe that [she] ... is going to let him do this to her one time without complaining about it?" (Tr. II/94-95). In making this argument, defense counsel also noted additional testimony (Tr. II/89), given by both Rock and the complainant, that Rock had talked with the complainant about sexual abuse and had assured her that if she were ever abused, she could come tell her mother and would be believed (Tr. I/132, 173-174; II/42-43).

sexually abused her (Tr. I/138-139).^{4/}

2. The Complainant's Subsequent Statements

Also on February 19, 2000, following her complaint to her mother, the complainant was taken to a hospital (Tr. I/141), where she was interviewed by an emergency room nurse, Laurie Frazer (Tr. II/67-69). Frazer was called by the defense and testified as follows..

The complainant told Frazer that in a conversation with a friend that night, her friend revealed that she had been molested, and the complainant then told her friend that she had also been molested (Tr. II/69-71, 80). Specifically, the complainant said that the conversation and her complaint to her friend both occurred that night (Tr. II/79, 81). Based on the complainant's statements, it was Frazer's impression that the complaint made that night was the complainant's "first" complaint to her friend (Tr. II/80) -- i.e., that "it all came to light that night" (Tr. II/80).^{5/}

^{4/}In closing argument, defense counsel suggested that it was the complainant's anger over this episode that actually triggered her complaint to her mother that day (Tr. II/89-90).

^{5/}Based on this testimony, defense counsel argued in closing that the complainant had not, in fact, made any complaint to Conigo several weeks earlier, as they claimed (see ante, at 6): "[T]here [is] a possibility that these two girls, being good friends, got together after the fact, and decided to put the time back" (Tr. II/92).

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In her own testimony, the complainant denied telling Frazer, or the police, that her first complaint to Conigo occurred in the conversation that night (Tr. I/164-165). The nurse testified, however, that she documented the complainant's statements in written notes (Tr. II/69, 73), and that she also had an "independent memory" of the complainant saying that the conversation and the complaint to her friend both occurred that night (Tr. II/79, 81).

C. The Defense Theory

The defense theory of this case was that the complainant's claims of abuse were fabricated. In her opening statement, defense counsel suggested that the complainant was not "telling the truth" (Tr. I/109-110), that "[no]thing really happened" (Tr. I/116), and that the defendant had been accused of "a crime that [he] didn't commit" (Tr. I/110, 115).

In her closing argument, defense counsel reiterated that "nothing was happening" (Tr. II/87), and stressed that the "only evidence" of the claimed abuse came from the complainant herself (Tr. I/85-86, 90, 91). In both her opening and her closing, defense counsel suggested that the key issue to be determined was the "credibility" of the complainant's claims (Tr. I/112) -- "[Y]our job is to figure out what you can credit and rely on" (Tr. II/90).

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D. The Defendant's Motion to Exclude Suspicion Evidence

Prior to trial, the defendant filed a motion in limine seeking to exclude various evidence, including the following:

4. Any evidence that Kimberly Rock, [the complainant's] mother, suspected or speculated that Freddie Parsons may have been molesting her daughter. Kimberly Rock told police she suspected something might be going on when she saw the complaining witness seated on the defendant's lap a few weeks before the report to police. Her observation of [the complainant] on the defendant's lap may be admissible, but her conjecture and speculation that something was going on should not be admissible as the prejudice to the defendant outweighs the probative value.

(R. 9-10) (emphasis added)

As to this evidence, the hearing on the motion consisted only of the following:

THE COURT: Any evidence that the mother suspected or speculated, obviously, should not be admissible.

[THE PROSECUTOR]: I agree.

(Tr. I/92-93)

Thereafter, however, the excluded matter was implicated by the prosecutor during his direct exami-

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nation of the complainant's mother.^{6/} It was also raised expressly by the prosecutor's redirect examination of the mother, following her testimony, on cross-examination, that she had had conversations with the complainant about sexual abuse (Tr. II/42-43; see also Tr. I/132, 173-174). The prosecutor's examination on redirect is the subject of argument A., post.

ISSUE PRESENTED

Whether the judgments must be reversed because of prejudicial errors committed by the prosecutor in examination of the complainant's mother and in closing argument to the jury.

^{6/}Q. Did you ever see her sitting on his lap?

[DEFENSE COUNSEL]: Judge, I object.

THE COURT: You know better than that, Mr. [Prosecutor].

[THE PROSECUTOR]: I'll withdraw it, your Honor.

THE COURT: You bet your life you will. Don't do it again.

(Tr. II/16)

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ARGUMENT

I.

THE JUDGMENTS MUST BE REVERSED DUE TO PREJUDICIAL ERRORS COMMITTED BY THE PROSECUTOR IN EXAMINATION AND CLOSING ARGUMENT.

The trial of this case was unfairly skewed in the Commonwealth's favor by improper suspicion evidence and an improper appeal to the jury's sympathies. The two errors are discussed below.

- A. The prosecutor improperly elicited evidence that the complainant's mother had suspected that the defendant was sexually abusing the complainant.

On redirect of the complainant's mother, the prosecutor elicited testimony stating the mother's suspicion of the defendant due to an incident, described earlier in her testimony (Tr. II/14-15), in which the defendant had driven the complainant to the store. The testimony on redirect appears as follows:

Q. Why did you have those conversations with [the complainant about sexual abuse]?

- A. After the incident with them going to the store, I felt uncomfortable about how long they took, and I figured -- something told me -- I don't know if it was a mother's instinct --

[DEFENSE COUNSEL]: Judge, I object.

THE COURT: Yes, sustained.

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You may say that you felt uncomfortable when it took so long to go to the store, but that's it.

(Tr. II/43)

The examination was improper and the resulting evidence was prejudicial.

A witness' suspicion that the defendant has committed a crime amounts to the witness' mere opinion, which is ordinarily "irrelevant in a criminal trial." Commonwealth v. Lennon, 399 Mass. 443, 445 (1987), and cases cited. For that reason, suspicion testimony very similar to that elicited here has been held "erroneously admitted" and has required reversal. Commonwealth v. Martin, 417 Mass. 187, 189-191 (1994) (involving testimony that witness had "instinct or suspicion that the defendant had 'something [sexually] to do' with the complainant") (alteration original). See Commonwealth v. Duff, 245 Mass. 81, 85 (1923) (involving testimony that defendant's wife "suspected" that defendant had "improper relations" with complainant). In this case, moreover, the testimony was presented in violation of the judge's prior ruling that suspicion evidence "obviously" was not admissible (Tr. I/92-93), see Commonwealth v. Brown, 376 Mass. 156, 166 (1978); Commonwealth v. Roderick, 429 Mass. 271, 274

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(1999) ("the prosecutor should not ask a question that will inevitably lead to [excluded] evidence"), and in violation of the prosecutor's own agreement not to present it (Tr. I/93). See Commonwealth v. Felton, 16 Mass. App. Ct. 63, 66 (1983) ("The Commonwealth must keep its promises"), quoted in Commonwealth v. Lavin, 42 Mass. App. Ct. 711, 713 (1997).

The Appeals Court stressed that, on defense counsel's objection, the judge excluded the most explicit portion of the suspicion testimony (Memo. at 2) -- i.e., that "something told me," maybe "a mother's instinct," that the defendant might be sexually abusing the complainant (Tr. II/43). But the judge also left in place the mother's remaining testimony that she "felt uncomfortable" about the matter (Tr. I/43), which amounted to exactly the same thing -- i.e., that she "felt uncomfortable" that the defendant might be sexually abusing the complainant. On defense counsel's objection, then, the judge should have excluded all of the improper suspicion testimony, including the mother's testimony that she "felt uncomfortable" about the matter.

The testimony was inadmissible and the judge's response was inadequate.

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B. The prosecutor improperly argued in closing that the jurors should place themselves in the complainant's position in giving her testimony on the stand.

In her closing argument, defense counsel properly stressed the numerous inconsistencies in the complainant's testimony, particularly as to her memory, or lack of memory, of the incidents alleged ("She changed her testimony right on the stand on certain points") (Tr. II/91-92). In his closing, the prosecutor responded by asking the jurors to place themselves in the complainant's position, as follows:

Inconsistencies, there are some inconsistencies in this case, absolutely....

But think about the opportunities for the honest person to have inconsistencies, and by analogy, use your own common life experiences. You're all sitting here at this trial today. What if I asked you in a month, or two weeks, three weeks, a month from now, to sit down with a police officer and tell him what happened at this trial? Then two police officers that you have never met. A couple of days later, three, a third.

Say, for instance, that the trial had lasted for two and a half years. Then you spoke with the DSS worker about the trial, and then you spoke with a number of members of the district attorney's office about the trial. Each time, more time goes by, and they are taking notes, and they are writing reports on it. Do you think there might be some inconsistencies there, even if you were just trying to tell what happened?

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Say it wasn't a trial, but it was one of the deepest, darkest secrets that you had, one of the most emotionally traumatic things that has ever happened to you, and you cry throughout the first three or four interviews. Think that would make it difficult? Could there possibly be inconsistencies, even when you're honestly trying to tell what happened? Of course, ladies and gentlemen.

(Tr. II/104-105) (emphasis added)

At the conclusion of the prosecutor's closing, defense counsel approached the bench and objected to this argument as follows: "He asked the jurors to put themselves in a situation where they might be interviewed about some other matter. I think that's totally inappropriate" (Tr. II/112). The judge, however, responded only, "Okay. Objection is noted" (Tr. II/112), and gave no curative instructions. The argument was improper.

It is now well established that a prosecutor may not urge the jurors to "place yourselves in th[e] position" of the alleged victim. Commonwealth v. Sevieri, 21 Mass. App. Ct. 745, 753-755 (1986). See e.g., Commonwealth v. Valentin, 420 Mass. 263, 274 (1995); Commonwealth v. Fletcher, 435 Mass. 558, 568 n.6 (2002); Commonwealth v. Vaughn, 23 Mass. App. Ct. 40, 43 n.3 (1986). The rule also applies to the particular variant of the argument made in the present case.

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See Commonwealth v. Esteves, 46 Mass. App. Ct. 339, 342-343 (1999) ("The prosecutor improperly ... asked the jury to put themselves in the victim's place as [she] testified on the witness stand"); Commonwealth v. Jordan, 49 Mass. App. Ct. 802, 816 (2000) (prosecutor asked jury to "put yourselves ... into the shoes of [the victim] who is in a public courtroom testifying...."). "The invitation to the jury to put themselves in the position of the victim is usually improper." Id.

Here, it was likewise improper for the prosecutor to invite the jurors to imagine testifying, as the complainant did, about conversations with numerous different officials (Tr. II/104-105) -- particularly, conversations about "one of the most emotionally traumatic things that has ever happened to you, [where] you cry throughout the first three or four interviews" (Tr. II/105). Furthermore, defense counsel's objection specifically identified the impropriety in the argument (Tr. II/112), but the judge gave no curative instruction directed "specifically" at that argument. Commonwealth v. Santiago, 425 Mass. 491, 501 (1997). See, e.g., Commonwealth v. Hawley, 380 Mass. 70, 85 (1980)

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(noting that improper argument "was not pointed to or called improper").

The Appeals Court concluded that the argument was "improper" (Memo. at 4), and that conclusion was correct.

C. The prosecutor's errors were prejudicial and require reversal of the defendant's convictions.

The only disputed issue in this case was whether the claimed sexual abuse actually occurred or not.

On that issue, the Commonwealth's only claimed witness to the abuse was the complainant, whose testimony was directly challenged as false (see ante, at 12), and her testimony concerning the claimed incidents was not only vague, but self-contradictory on matters of significance -- whether she did or did not recall the first claimed incident at all, and whether she did or did not recall a key portion of the second claimed incident (see ante, at 3-5). In addition, the complainant's credibility was further undercut by affirmative evidence of a motive to lie -- her own testimony acknowledging that she "never like[d]" the defendant, that she had long "resented" his rules constraining her behavior, and, indeed, that she was "mad" at the defendant for enforcing one of those rules on the very day

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that she first complained to her mother of the claimed abuse (see ante, at 9-11).

The remainder of the Commonwealth's case consisted mainly of evidence of fresh complaint, which in effect, merely repeated the complainant's claims. See Commonwealth v. Licata, 412 Mass. 654, 657, 660 (1992)

(stressing that fresh complaint is not substantive evidence that complaint is true). The Commonwealth presented no medical, physical or scientific evidence corroborating the complainant's claims, a factor that is significant in evaluating the strength of the Commonwealth's case. See, e.g., Commonwealth v. Worcester, 44 Mass. App. Ct. 258, 267 (1998) ("There was no physical evidence ... [so] all depended on whom the jury believed"). And while the Commonwealth did present testimony from the complainant's mother alleging an admission by the defendant, that testimony was also challenged as false, and that challenge was also based on self-contradictory testimony -- in the mother's case, as to whether the defendant actually denied committing the claimed abuse (see ante, at 7-8 & n.2). See Commonwealth v. Ford, 397 Mass. 298, 301-302 (1986) (rejecting conclusion that defendant's alleged

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confession was dispositive, where testimony alleging confession was itself "disputed")..

In short, this is a case where "[t]he strength of the Commonwealth's evidence turned on the credibility of [its witnesses]," Commonwealth v. Kelleher, 395 Mass. 821, 827 (1985), and the credibility of those witnesses was an issue solely "for the jury." Commonwealth v. Ford, supra, at 302. The Commonwealth's evidence against the defendant therefore cannot be viewed as "overwhelming." Commonwealth v. Perez, 411 Mass. 249, 260 (1991).

In these circumstances, the errors committed by the prosecutor were highly prejudicial to the defense. First, there was the improper evidence that the complainant's mother suspected -- or, as it was left with the jury, "felt uncomfortable" -- that the defendant might be sexually abusing the complainant (Tr. II/43). The complainant's mother was the defendant's girlfriend (Tr. I/119), who had lived with him for five years (Tr. II/4), and presumably knew him well. Particularly for that reason, the very fact that she suspected the defendant of committing such abuse, and, indeed, had harbored that suspicion even before the complainant ever complained of such abuse, added substantial weight

to the credibility of the complainant's claims. See Commonwealth v. Martin, supra, 417 Mass. at 189-191 (involving similar improper testimony, also from defendant's girlfriend, concerning her suspicion that defendant had sex with complainant).

Second, the prosecutor's improper argument urged the jurors to place themselves in the complainant's position in recounting "one of the deepest, darkest secrets that you had, one of the most emotionally traumatic things that has ever happened to you" (Tr. II/105). This dramatic, and personalized, appeal easily could have diverted the jury's focus from the issue in dispute -- whether, in fact, the claimed traumatic events ever happened at all -- to sympathy for the complainant's plight. Since the argument thus unfairly bolstered the credibility of the complainant's claims, a reviewing court "cannot be certain that the jury's conclusion was not clouded by the improper appeal." Commonwealth v. Santiago, supra, 425 Mass. at 501-502.

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CONCLUSION

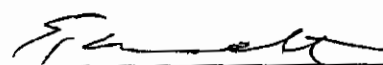
For the reasons stated herein, the prosecutor's improper examination and argument both constituted prejudicial error, and violated the defendant's right to a fair trial under the Fourteenth Amendment to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights. Therefore, the judgments should have been reversed by the Appeals Court, and this Court should grant the defendant's application for further appellate review.

Also, the defendant continues to press his argument that the convictions of indecent assault and battery and assault with intent to rape are duplicative of the rape conviction (see D.B., Argument II), which has not been addressed herein due to limitations of space. If further review is granted, the defendant requests that the Court consider that argument as well.

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